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June 27, 2008

Electronic Ex Parte Filing

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Petitioners' Alternative Rulemaking Proposal
CC Docket No. 96-128

Dear Ms. Dortch:

In accordance with Section 1.1206(b)(1) of the Commission's rules, Petitioners Martha Wright, *et al.*, submit the attached letter to Chairman Kevin J. Martin for inclusion in the public record of the above-captioned docket. Please do not hesitate to contact the undersigned with any questions or concerns about the attached letter or the issues discussed.

Very truly yours,

/s/ Frank W. Krogh
Frank W. Krogh

Counsel to Petitioners

cc: Chairman Kevin J. Martin
Commissioner Michael J. Copps
Commissioner Jonathan S. Adelstein
Commissioner Robert M. McDowell
Commissioner Deborah Taylor Tate
Amy E. Bender

Marlene H. Dortch
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Honorable Kevin J. Martin
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Petitioners' Alternative Rulemaking Proposal
CC Docket No. 96-128

Dear Chairman Martin:

Petitioners Martha Wright, *et al.* ("Petitioners"), respond to the *ex parte* letter filed by Securus Technologies, Inc. ("Securus") on May 23, 2008 ("Securus Letter").¹ Securus largely regurgitates its prior arguments opposing Petitioners' Alternative Rulemaking Proposal ("Proposal"),² except to misstate some additional factual points. Because Petitioners have already responded to these and similar arguments in their Reply Comments and *ex parte* filings, Petitioners will refer back to prior submissions whenever possible.³

¹ Letter from Stephanie A. Joyce, Counsel for Securus Technologies, Inc., to Hon. Kevin J. Martin, Chairman, FCC, CC Docket No. 96-128 (May 23, 2008) ("Securus Letter").

² Petitioners' Alternative Rulemaking Proposal, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Dkt. No. 96-128 (Mar. 1, 2007) ("Proposal"); FCC Public Notice, *Comment Sought on Alternative Rulemaking Proposal Regarding Issues Related to Inmate Calling Services*, 22 FCC Rcd 4229 (WCB 2007).

³ Petitioners' Reply Comments, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Dkt. No. 96-128 (June 20, 2007) ("Reply Comments").

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Because Securus and other service providers have had so many opportunities to fill in gaps in the record and to rebut Petitioners' comparable rates and cost analyses, it might be useful to highlight what Securus and the other service providers have *not* said:

- Securus and other service providers have complained about their low overall inmate calling service returns, but none of them has specified its return on *interstate* inmate services, the subject of the Proposal, or demonstrated that those services are not extremely profitable.
- Securus and the other service providers have never explained, in terms of cost differences or otherwise, how they are able to provide interstate inmate calling services profitably to some prison systems at rates, net of commission payments, that are lower than the Petitioners' requested benchmark rates, but not to all other state and other prison systems at similar rates.
- Securus and the other service providers have not rebutted any of the factual support for Petitioners' comparable rates analysis. As explained below, Securus' assertions as to the rates in two of the illustrative inmate service contracts on which Petitioners rely are simply incorrect.
- Securus and the other service providers have never provided any cost studies or reliable cost data regarding their interstate inmate calling services.

By repeatedly failing to address these decisional issues, Securus and the other service providers have essentially conceded all of the elements of Petitioners' case for the imposition of interstate inmate calling benchmark rates of \$0.20 per minute for debit calling and \$0.25 per minute for collect calling, with no per-call charge.⁴

Rather than try to salvage its case at this late date, Securus instead leads off with a quibble over nomenclature. It strenuously argues that the relief Petitioners are seeking should not be characterized as "benchmarks," but, rather, "caps." Securus asserts that a benchmark is merely a "presumptively reasonable" rate for a service that can be exceeded under prescribed conditions.⁵ As Petitioners pointed out in their Reply Comments, however, the possibility of waiver relief is always available to a service

⁴ *Id.* at 1-7.

⁵ Securus Letter at 1-2.

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provider demonstrating unusual costs.⁶ In any event, the Commission has the authority to establish rate ceilings, whatever Securus wants to call them.⁷

Securus argues that a single set of benchmark rates is inappropriate because of the differences in costs and call volumes among different types and sizes of facilities and that the requested benchmark rates are based on an analysis of only the largest, lowest-cost facilities.⁸ Petitioners addressed these arguments at length in their Reply Comments and the supporting Reply Declaration of Douglas A. Dawson (“Dawson Reply Declaration”).⁹ Without repeating all of Petitioners’ responses, the Commission has “repeatedly rejected the proposition that rates . . . must be based on . . . the costs of actual facilities used to provide service to a particular customer.”¹⁰ Indeed, Securus rebuts its own argument by including in its Exhibit B its subsidiaries’ standard interstate inmate collect calling rates shown in their respective “Federal Price List[s].”¹¹ If differences among facilities precluded averaged rates, Securus would not have standard interstate inmate rates.¹²

Securus also overlooks the data provided by Pay Tel Communications, Inc. (“Pay Tel”) showing that the overwhelming majority of interstate inmate calls are made from the large prison systems that Securus asserts exhibit lower costs than smaller facilities.¹³ As the Commission has noted, most calls from city and county facilities are

⁶ Reply Comments at 16 n.49.

⁷ Proposal at 11-12, 16.

⁸ Securus Letter at 2-3.

⁹ See Reply Comments at 14-16; Reply Declaration of Douglas A. Dawson in Support of Petitioners’ Alternative Rulemaking Proposal ¶¶ 16, 18-20 (June 20, 2007) (“Dawson Reply Declaration”), appended as Attachment A to Petitioners’ Reply Comments.

¹⁰ *New Valley Corp. v. Pacific Bell*, 15 FCC Rcd 5128, 5130 (2000) (citing *Private Line Rate Structure Guidelines and Volume Discount Practices*, 97 F.C.C.2d 923, 934-41 (1984) for the proposition that “rate development should reflect average cost of providing service, not cost of equipment/facilities used to provide service to a particular customer”).

¹¹ Securus Letter at Exh. B.

¹² See also Declaration of Douglas A. Dawson in Support of Petitioners’ Alternative Proposal ¶ 18 (Feb. 16, 2007) (“Dawson Alternative Declaration”), attached as Appendix B to the Proposal (discussing service provider standard interstate inmate service rates).

¹³ See Reply Comments at 15-16; Dawson Reply Declaration ¶¶ 19-20.

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local or intraLATA toll.¹⁴ Most of the remainder are intrastate interLATA calls.¹⁵ The occasional interstate call made from a jail or small prison thus will have no significant economic impact on the service provider serving that facility, especially a service provider, such as Securus, that enjoys economies of scale from serving state prison systems and other large facilities.¹⁶ The only exception might be a service provider improperly subsidizing below-cost local and intrastate calls with revenue from a relatively few overpriced interstate calls.¹⁷

Securus also repeats the service providers' argument that inmate calling services incur many security-related costs that standard residential services do not bear.¹⁸ Securus still cannot explain, however, why it and other service providers are able to serve various disparate state and federal prison systems profitably at rates that, net of commission payments, are equivalent to or below the benchmark rates requested by Petitioners. The service providers also have failed to explain how the cost characteristics of those systems differ from the costs of all other state and other large prison systems, or why they could not serve all such systems at similarly reasonable rates.¹⁹ Blending usage and connect charges into an equivalent per-minute rate, Petitioners have cited ten federal and state inmate calling service contracts with blended interstate prepaid or debit rates, net of commission payments, that are equal to or less than the Petitioners' requested benchmark debit rate of \$0.20 per minute and five state contracts with blended interstate collect rates, net of commission payments, less than the requested benchmark collect calling rate of \$0.25 per minute.²⁰

¹⁴ *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order on Remand and Notice of Proposed Rulemaking, 17 FCC Rcd 3248, 3253 (2002) ("Inmate Payphone Order").

¹⁵ Reply Comments at 15-16 & n.48.

¹⁶ *See id.* at 16-17; Dawson Reply Declaration ¶¶ 21-23 (discussing Securus' and other inmate service providers' economies of scale).

¹⁷ *See infra* text accompanying notes 46-49.

¹⁸ Securus Letter at 3-4.

¹⁹ Reply Comments at 8-13; Dawson Reply Declaration ¶¶ 8-16.

²⁰ *See* Reply Comments at 8-13 & n.25 (citing debit calling rates for Federal Bureau of Prisons, Department of Homeland Security facility operated by GEO Group, Inc., and Colorado, Indiana, Maryland, Missouri, Nebraska and Vermont correctional facilities, and collect calling rates for Florida, Missouri, New Hampshire and New York correctional facilities); letter from Frank W. Krogh, Counsel to Petitioners, to Marlene H. Dortch, Secretary, FCC, at 1-2, CC Docket No. 96-
(Footnote Continued)

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Even more remarkably, the unadjusted interstate rates -- *i.e.*, without taking commission payments into account or where there is no commission -- are equal to or less than the requested benchmark debit rate for six of the contracts and are less than the requested benchmark collect calling rate for five contracts.²¹ Thus, interstate inmate service costs are now so low that Securus and other providers are able to offer rates equivalent to or less than the requested benchmarks *while paying commissions*.

For example, in 2007, the Florida Department of Corrections entered into a new Inmate Telephone Service contract with Securus providing for inmate interstate collect calling service for a connect charge of \$1.20 plus \$0.04 per minute and inmate interstate prepaid service for a connect charge of \$1.02 plus \$0.04 per minute.²² For a 15-minute call, blending the usage and connect charges yields a collect rate equivalent to \$0.12 per minute, and the blended prepaid rate is less than \$0.11 per minute, about half the requested benchmark rates. After paying a 35 percent commission, *Securus receives slightly under \$0.09 per minute for a 15-minute collect call and \$0.08 per minute for a*

128 (Nov. 1, 2007) ("Petitioners' Nov. 2007 Letter") (citing reduced collect calling rate for New York correctional facilities and reduced prepaid and collect calling rates in new contract for Florida correctional facilities); letter from Frank W. Krogh, Counsel to Petitioners, to Marlene H. Dortch, Secretary, FCC, at 2-3, CC Docket No. 96-128 (Dec. 3, 2007) ("Petitioners' Dec. 2007 Letter") (citing reduced prepaid and collect calling rates in new contract for New Hampshire correctional facilities); letter from Frank W. Krogh, Counsel to Petitioners, to Marlene H. Dortch, Secretary, FCC, at 1-2, CC Docket No. 96-128 (Feb. 7, 2008) ("Petitioners' Feb. 2008 Letter") (citing collect calling rate in new contract for Oklahoma correctional facilities).

²¹ See Dawson Alternative Declaration ¶¶ 31-32, 42 (Nebraska blended debit rate of \$0.20 per minute with no commission, Vermont blended debit rate of less than \$0.18 per minute before taking commission payments into account, and Missouri debit rate of \$0.10 per minute and blended collect rate of \$0.15 per minute with no commission); Reply Comments at 9 & n.25 (GEO Group contract to provide inmate service, presumably debit calling service, at Homeland Security facility for \$0.17 per minute); Petitioners' Nov. 2007 Letter at 1-2 (New York blended collect rate of \$0.135 with no commission); Petitioners' Dec. 2007 Letter at 2-3 (New Hampshire prepaid rate of \$0.15 per minute and blended collect rate of \$0.16 per minute without taking commission payments into account); Petitioners' Feb. 2008 Letter at 1-2 (Oklahoma collect rate equivalent to \$0.24 per minute without taking commission payments into account). Securus' contract to provide inmate services to Florida correctional facilities also has interstate prepaid and collect rates below the requested benchmarks without taking commission payments into account. See *infra* text accompanying notes 22 and 23.

²² See Petitioners' Nov. 2007 Letter at 2.

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*15-minute prepaid call.*²³ This remarkably low net rate, as well as the low net rates received by Securus from its Indiana and Maryland inmate calling service contracts -- which presumably cover all of the security costs mentioned in the Securus Letter -- suggest that Petitioners' requested benchmarks are too high, not too low.

Securus attempts to undermine Petitioners' comparable rates analysis by challenging Petitioners' assertions regarding the interstate rates charged in its Indiana inmate service contract. It states that, contrary to Petitioners' representations, the interstate prepaid rate in the Indiana contract includes a per-call connect fee of \$1.50.²⁴ That is incorrect. All of the rate options listed on the rate sheet cited by Securus are clearly limited to "Inmate Collect Call[s]."²⁵ Moreover, that rate sheet is modified by an April 9, 2001 letter from T-NETIX, Inc. ("T-NETIX"), now a subsidiary of Securus, to Shelley Harris of the Indiana Office of Administration, confirming that the prepaid interstate rate is \$0.25 per minute, with no connect fee.²⁶ To remove any doubt, the Procurement Division of the Indiana Department of Administration ("IDOA") confirmed that "[t]he prepaid rate is 25 cents a minute with no call connect fee."²⁷ If Securus is, in fact, charging a call connect fee for prepaid interstate calls from Indiana correctional facilities, it is doing so in violation of its contract.

Securus also disputes Petitioners' assertion that the interstate debit rate in Global Tel*Link's contract covering Nebraska correctional facilities is \$0.16 per minute plus a \$0.60 service charge, for a blended rate of \$0.20 per minute for a 15-minute call. Securus states that "the prevailing rate for an interstate call is \$.20 per minute with a \$0.75 service fee," citing a rate chart attached to the Securus Letter.²⁸ Again, Securus is incorrect. The rate sheet attached to the original Nebraska contract clearly shows two

²³ *Id.*

²⁴ Securus Letter at 4.

²⁵ Dawson Alternative Declaration, Exh. 13, App. 6 (cited in the Securus Letter at 4).

²⁶ The T-NETIX letter also notes that the collect rate includes a \$1.50 connect fee, further confirming that, by omitting any mention of a connect fee as part of the prepaid rate, T-NETIX intended in its letter to limit the prepaid rate to a per-minute charge. The rate sheet and T-NETIX letter, which are the last two pages of Exhibit 13 to the Dawson Alternative Declaration, are also appended hereto as Attachment A.

²⁷ E-mail from Mark Hempel, Senior Account Manager, IDOA, to Frank W. Krogh (June 25, 2008) (emphasis added) (appended hereto as Attachment B).

²⁸ Securus Letter at 4 & Exh. A.

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different rates for interstate collect and debit calls and that the debit rate is \$0.16 per minute with a \$0.60 service charge.²⁹ The renewal of that contract with Global Tel*Link dated September 6, 2007 makes no changes to the rates.³⁰ Accordingly, as confirmed by the Nebraska Department of Correctional Services, “[t]he rates are the same as in the original 2002 contract award. . . . *Interstate debit rates are \$0.60 surcharge and 0.16 per minute.*”³¹ For a 15-minute call, the Nebraska rates therefore are exactly the same as the Petitioners’ requested benchmark rates.³² Petitioners’ comparable rates analysis thus stands intact.

Securus also complains that Petitioners’ proposed benchmark rates do not reflect the higher costs incurred in the first minute of an inmate call and that a per-call charge should be a component of any benchmark rate.³³ As Petitioners have explained, however, given the automated nature of inmate calls, including inmate collect calls, the first minute of an inmate call incurs no greater costs than any subsequent minute.³⁴ In fact, inmate debit and prepaid rates now typically contain no per-call charges.³⁵ In any event, if the Commission were to establish a benchmark interstate inmate collect calling rate with a per-call charge, the benchmark rate should be no greater on a blended basis than the requested rate of \$0.25 per minute for a call of average length, and the per-call charge should be waived for any collect call reinitiated by the same prisoner to the same number within two minutes of the end of the previous call. There have been widespread

²⁹ The rate sheet is attached as the last page of Exhibit 14 to the Dawson Alternative Declaration.

³⁰ See State of Nebraska Service Contract Award, Contract No. 2685 O4 (Order Date Sept. 6, 2007) (appended hereto as Attachment C).

³¹ E-mail from Terry R. Ewing, Special Services Administrator, Nebraska Department of Correctional Services, to Frank W. Krogh (May 28, 2008) (emphasis added) (appended hereto as Attachment D).

³² See Dawson Alternative Declaration ¶ 31.

³³ Securus Letter at 5.

³⁴ See Reply Comments at 22-23; Dawson Reply Declaration ¶ 26.

³⁵ See Reply Comments at 23; Dawson Alternative Declaration ¶¶ 30-32 (describing federal Bureau of Prisons, Indiana, Maryland and Missouri debit and prepaid inmate rates with no per-call charges).

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reports of interrupted and dropped inmate collect calls, causing called parties to incur repeated set-up charges for reinitiated calls.³⁶

Securus follows up on its per-call charge point by repeating its bogus comparison with the high rates charged to the general public for operator services at public payphones. As Petitioners previously explained in response to that point, there is no longer any relationship between the cost of commercial interstate operator service collect calling services and their rates. Users of commercial operator services are paying for the convenience of making a call without a cell phone or calling card.³⁷ In any event, Securus' own inmate calling service contracts disprove any connection between the cost of providing interstate inmate services and commercial long distance payphone operator service rates charged to the general public. Securus could not possibly provide interstate inmate services at the reasonable rates that it charges to Florida, Indiana and Maryland inmates, net of commission payments, if its costs were as high as commercial operator service rates.

More importantly, as the Commission has explained, unlike the users of commercial payphone operator services, "inmates have none of the alternatives available to non-incarcerated payphone customers."³⁸ The Commission held in the *CLEC Access Reform Order* that, while it may be appropriate to "abstain entirely from regulating the market in which . . . customers" enjoy the freedom to "decide whether [to] find an alternative provider," it is necessary to restrict carriers' "exercise of . . . monopoly power" "in the manner that they recover their costs from those . . . consumers *that have no competitive alternative*."³⁹ Commercial payphone operator service rates available to users with a variety of other choices thus have no bearing on a comparable rates analysis of prison inmate calling services.

Securus also complains about the lack of detailed cost studies in the record which, as Petitioners have repeatedly noted, is due to Securus' and other service providers' repeated failures to submit such studies.⁴⁰ Petitioners have submitted more

³⁶ Reply Comments at 23; Dawson Reply Declaration ¶ 24.

³⁷ Dawson Alternative Declaration ¶¶ 10-11.

³⁸ *Inmate Payphone Order*, 17 FCC Rcd at 3253.

³⁹ *Access Charge Reform*, 16 FCC Rcd 9923, 9938 (2001) (emphasis added) ("*CLEC Access Reform Order*"), *recon. denied*, 19 FCC Rcd 9108 (2004).

⁴⁰ Securus Letter at 6-7; Reply Comments at 6-7.

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than sufficient current data for a comparable rates analysis, buttressed by a conservative cost analysis based partly on data submitted by the service providers.⁴¹ Securus complains that some of the service provider data on which Mr. Dawson relied is not current.⁴² That is because the service providers have failed to provide any more recent information about their costs, probably because those costs are even lower than they were a few years ago.

Because the service providers have “withheld the very cost data that would have enabled the Commission to establish precise, cost-based rates,” it must be concluded in these circumstances that Petitioners’ “methodology provides a reasonable basis for

⁴¹ See Proposal at 16-23; Reply Comments at 5-13. Securus complains, at 8, that Petitioners’ expert, Mr. Douglas A. Dawson, provided no source for his February 2007 statement that he typically procures wholesale transport and terminating service for about \$0.0125 per minute. Three years earlier, however, in April 2004, Mr. Dawson stated that he typically purchased wholesale transport and termination service from MCI for \$0.02 per minute, less than a penny higher than his 2007 estimate. Reply Declaration of Douglas A. Dawson ¶ 29 (Apr. 21, 2004), appended as Attachment A to Petitioners’ Reply Comments, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Dkt. No. 96-128 (Apr. 21, 2004). MCI, which was participating in the proceeding in 2004 and filed reply comments in opposition to Petitioners, never challenged that statement. See, e.g., Reply Comments of MCI, Inc., *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Dkt. No. 96-128 (Apr. 21, 2004). Because Mr. Dawson’s estimate of the total cost of inmate long distance debit calling is only \$0.06 per minute, adding another penny per minute to accommodate his unchallenged 2004 estimate of transport and termination costs would still leave his cost estimate far below the requested benchmark of \$0.20 per minute. Dawson Alternative Declaration ¶ 26.

Securus also complains, at 8, that Mr. Dawson did not explain why he reduced the estimated difference in cost between inmate debit and collect calling from \$0.06 to \$0.05 per minute. A few pages later in the same declaration, however, he did explain that reduction in detail. See Dawson Alternative Declaration at ¶ 40 n.42, ¶ 41.

⁴² Securus Letter at 8. Securus, at 6, exaggerates the age of some of the service provider data on which Petitioners partially relied by stating that it was filed in July 1996 comments. In fact, the data to which Securus refers was submitted in an *ex parte* filing dated April 6, 2000. It was later attached as Exhibit 12 to the Affidavit of Douglas A. Dawson appended as Attachment A to Petition for Rulemaking or, in the Alternative, Petition to Address Referral Issues in Pending Rulemaking, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Dkt. No. 96-128 (Nov. 3, 2003) (“Wright Petition”).

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establishing . . . benchmarks. . . .”⁴³ It was up to Securus and the other service providers to rebut Petitioners’ showing, which has become stronger as more states, such as Oklahoma and Florida, have begun to offer interstate inmate services at rates below the requested benchmarks, net of commission payments.⁴⁴ Instead, the service providers have relied upon “generalized assertions that their rates are justified by higher costs,” which are not adequate to rebut Petitioners’ showing.⁴⁵

The most likely reason that Securus and the other service providers have neglected to submit any cost data regarding their interstate inmate services is because those services are profit centers. Securus and other service providers complain about their overall returns,⁴⁶ but they have carefully avoided any disclosures as to the net revenues or earnings on their *interstate* rates. As Petitioners pointed out, Pay Tel admitted that its *interstate inmate revenues* “make up for the losses from below-cost local [inmate] collect call rates.”⁴⁷ The disproportionate contribution of interstate inmate calls to overall revenues is not confined to Pay Tel, nor is it a recent phenomenon. An inmate service provider trade association filing in 2000 showed that the five percent of all inmate calls from county jails in three states that were interstate generated 21 percent of the total inmate calling revenue from those facilities.⁴⁸ One of the members of that association was Evercom Systems, now a Securus subsidiary.⁴⁹

⁴³ *Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224, 1233 (D.C. Cir. 1999) (“*Cable & Wireless*”) (quoting *International Settlement Rates*, 12 FCC Rcd 19806, 19839 (1997)).

⁴⁴ See Petitioners’ Nov. 2007 Letter at 2 (discussing Securus’ Florida rates); Petitioners’ Feb. 2008 Letter at 1-2 (discussing Oklahoma inmate rates).

⁴⁵ *CLEC Access Reform Order*, 16 FCC Rcd at 9941 n.104.

⁴⁶ See, e.g., Securus Letter at 4 & n.4.

⁴⁷ Reply Comments at 7 (quoting Comments of Pay Tel Communications, Inc. at 17 n.40, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Dkt. No. 96-128 (May 2, 2007) (“Pay Tel Comments”)) (emphasis added).

⁴⁸ See Charts captioned “County Jail Type of Call Distribution” and “County Jail Revenue by Type of Call,” attached to letter from Robert F. Aldrich, Counsel to Inmate Calling Service Providers Coalition, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 96-128 (May 10, 2000) (“Aldrich Letter”).

⁴⁹ See Chart captioned “Independent Inmate Phone Service Providers (as of May 2000),” attached to Aldrich Letter.

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Any rate that earns enough to contribute so substantially to the costs of other services and pay a commission rate from 30 to 65 percent is unreasonably excessive, by any measure.⁵⁰

Securus also appears not to understand this Commission's position on the commissions paid by inmate service providers to prison administrators and correctional authorities, quoting a Kentucky correctional official's assertion that commissions "'are not profit.'" ⁵¹ To bring Securus up to date, "*commissions paid to the inmate facilities . . . are location rents.*" ⁵² "[L]ocation rents are not a cost of payphones, but should be treated as profit." ⁵³ More precisely, they "represent an apportionment of profits between the facility owners and the providers of the inmate payphone service." ⁵⁴ Contrary to Securus' suggestion, these determinations were not put out for comment. ⁵⁵ Securus is correct, however, that the commissions paid by the service providers are often higher than the 30 percent assumed by Petitioners in calculating an average service provider profit rate. ⁵⁶ That is another, independent basis for the conclusion that most inmate service providers' rates are unreasonably excessive. ⁵⁷

Because commissions constitute profit, rather than an allowable cost of service, they need not be accommodated in deriving a reasonable interstate rate. Contrary to Securus' characterization, service rates that are not high enough to permit the payment of commissions thus are not "below-cost rates." ⁵⁸ Accordingly, Petitioners have

⁵⁰ See *AT&T Corp. v. Business Telecom, Inc.*, 16 FCC Rcd 12312, 12332 (2001) ("*BTI*") (defendant failed to explain how revenues from a "truly reasonable" charge "could profitably permit" commissions of up to 24 percent of gross revenues), *recon. denied*, 16 FCC Rcd 21750 (2001).

⁵¹ Securus Letter at 8.

⁵² *Inmate Payphone Order*, 17 FCC Rcd at 3262 (emphasis added).

⁵³ *Id.* at 3255 (emphasis added).

⁵⁴ *Id.* at 3262.

⁵⁵ Securus Letter at 7 n.8.

⁵⁶ *Id.* at 7.

⁵⁷ Proposal at 22-23 (citing *BTI*, 16 FCC Rcd at 12332).

⁵⁸ Securus Letter at 8.

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proposed a “fresh look” transition to allow service providers to renegotiate their contracts in order to accommodate the requested benchmark rates. Such rates might not allow for the payment of hefty commissions, but that result does not constitute the regulation of state correctional authorities. “Otherwise, we would have to conclude . . . that the Environmental Protection Agency regulates the automobile industry when it requires states and localities to comply with national ambient air quality standards.”⁵⁹ Nor can the state statutes or practices cited by Securus⁶⁰ stand in the way of this Commission’s regulation of interstate telecommunications rates under Section 201(b) of the Communications Act.⁶¹

Finally, Securus complains that the proposed one year fresh look transition is too short a period for service providers to renegotiate all of their inmate service contracts.⁶² Given the “increasing frequency” with which inmate calling service contracts are being renegotiated “after contracts have been awarded” to reduce rates and commission payments, however, it seems unlikely that the proposed transition would be unmanageable.⁶³ Moreover, because the benchmarks will not cover the vast majority of inmate traffic that is local and intrastate, most inmate calling service revenue will not be affected by the benchmarks. Although interstate inmate traffic is far more profitable than local and intrastate traffic, local and intrastate traffic accounts for the vast bulk of total inmate calling revenues.⁶⁴ Presumably, local and intrastate inmate traffic thus also accounts for the bulk of commission payments, which are typically pegged to gross revenues.⁶⁵ In any event, waiver relief is available for any service provider demonstrating unusually burdensome circumstances.

⁵⁹ *Cable & Wireless*, 166 F.3d at 1230 (“no canon of administrative law requires us to view the regulatory scope of agency actions in terms of their practical or even foreseeable effects”).

⁶⁰ Securus Letter at 7.

⁶¹ Reply Comments at 33-37.

⁶² Securus Letter at 8-9.

⁶³ Comments of Public Communications Services, Inc. at 3, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Dkt. No. 96-128 (May 1, 2007).

⁶⁴ See Pay Tel Comments at Exh. 1, 2.

⁶⁵ Letter from Robert D. Evans, Director, Governmental Affairs Office, ABA, to Rep. Bobby Rush, at 2 (Jan. 31, 2006), attached as Appendix C to Proposal.

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Petitioners accordingly request that their Proposal be granted expeditiously. In accordance with Section 1.1206(b)(1) of the Commission's rules, a copy of this presentation is submitted for inclusion in the record of the above-captioned docket. Please do not hesitate to contact the undersigned with any questions or concerns about this letter or the issues discussed.

Very truly yours,

/s/ Frank W. Krogh
Frank W. Krogh

Counsel to Petitioners

cc: Commissioner Michael J. Copps
Commissioner Jonathan S. Adelstein
Commissioner Robert M. McDowell
Commissioner Deborah Taylor Tate
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Chris Moore
Penny Y. Nance
Dana R. Schaffer
Albert Lewis
Pamela Arluk
Lynne Engledow
Darryl Cooper
Douglas Galbi

ATTACHMENT A

APPENDIX 6 - MANDATORY

Please provide the State with at least four (4) different rate options showing the call connect fee/surcharge, per minute call cost, and commission percentage you will pay the State on the listed rates.

VENDOR PRICING WORKSHEET		
CALL CONNECT FEE	PER MINUTE COST	COMMISSION %
<u>Inmate Collect Call</u> \$3.00	<u>Inmate Collect Call</u> \$0.50	<u>Inmate Collect Call</u> 60.50%
<u>Inmate Collect Call</u> \$2.50	<u>Inmate Collect Call</u> \$0.45	<u>Inmate Collect Call</u> 57%
<u>Inmate Collect Call</u> \$2.25	<u>Inmate Collect Call</u> \$0.35	<u>Inmate Collect Call</u> 50%
<u>Inmate Collect Call</u> \$2.00	<u>Inmate Collect Call</u> \$0.30	<u>Inmate Collect Call</u> 44%
<u>Inmate Collect Call</u> \$1.50	<u>Inmate Collect Call</u> \$0.25	<u>Inmate Collect Call</u> 35%

All rate options are available for InterLATA Intrastate and InterLATA Interstate calls.

April 9, 2001

Ms. Shelley Harris
IDOA Manager
Procurement Division
State of Indiana

Via Email and Fax

Dear Ms. Harris:

T-NETIX' answers to the two questions you have submitted regarding our response to RFP ASA1-1-47 – Public Telephone Long Distance Services for the Indiana State Division of Information Technology are as follows:

1. One of the rates that T-Netix is proposing for inmate collect calls is \$1.50 call connect and \$.25 a minute regardless of whether it is an intrastate or interstate call at a 35% commission rate? YES or NO

T-NETIX RESPONSE: YES

2. The lowest rate for inmate prepaid is \$.25 a minute for all types of inmate prepaid calls. YES or NO

T-NETIX RESPONSE: YES

If you have any additional questions please contact me on 973-812-2393.

Sincerely,

Arthur E. Heckel
Vice President – Sales
T-NETIX, Inc.

ATTACHMENT B

Krogh, Frank

From: Hempel, Mark [mhempel@idoa.IN.gov]
Sent: June 25, 2008 4:11 PM
To: Krogh, Frank
Subject: RE: Prepaid Rate in Inmate Telephone Service Contract

Mr. Krogh:

The prepaid rate is 25 cents a minute with no call connect fee, unless you do advanced connect then its \$1.50 to connect the call and then 25 cents per minute.

Does this help you?

Thanks,
Mark

-----Original Message-----

From: Krogh, Frank [mailto:FKrogh@mofo.com]
Sent: Tuesday, June 24, 2008 6:34 PM
To: Hempel, Mark
Subject: RE: Prepaid Rate in Inmate Telephone Service Contract

Thanks for looking into this.

Frank Krogh

-----Original Message-----

From: Hempel, Mark [mailto:mhempel@idoa.IN.gov]
Sent: June 24, 2008 5:53 PM
To: Krogh, Frank
Subject: RE: Prepaid Rate in Inmate Telephone Service Contract

I should have an answer to you tomorrow. Thank you for your patience as I have been in many meetings the last couple of weeks.

-----Original Message-----

From: Krogh, Frank [mailto:FKrogh@mofo.com]
Sent: Friday, June 13, 2008 12:11 PM
To: Hempel, Mark
Subject: RE: Prepaid Rate in Inmate Telephone Service Contract

Mr. Hempel:

Thank you. I appreciate your attention to this matter.

Frank Krogh

-----Original Message-----

From: Hempel, Mark [mailto:mhempel@idoa.IN.gov]
Sent: June 13, 2008 12:05 PM
To: Krogh, Frank
Subject: RE: Prepaid Rate in Inmate Telephone Service Contract

Mr. Krogh:

This is a note to acknowledge receipt of your message. I am out of the office today in offsite meetings, but will look into your question further and provide an answer as expeditiously as possible early next week.

Regards,

Mark A Hempel
State of Indiana
(317) 232-2498

From: Krogh, Frank [mailto:FKrogh@mofo.com]
Sent: Fri 6/13/2008 11:13 AM
To: Hempel, Mark
Subject: Prepaid Rate in Inmate Telephone Service Contract

Mr. Hempel,

I am an attorney handling a case at the Federal Communications Commission involving prison inmate telephone service rates. I noticed that you signed the 2007 renewal of the T-Netix contract for inmate telephone services. A question has come up in the FCC proceeding about the long distance prepaid rate in the T-Netix contract - namely, whether there is just a usage charge of \$0.25 per minute or whether there is also a connect charge. Please call me at 202-887-8743. Thank you for your time.

Frank W. Krogh
Morrison & Foerster
2000 Pennsylvania Ave., N.W.
Washington, DC 20006
Voice: (202) 887-8743
Fax: (202) 887-0763
fkrogh@mofo.com

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For information about this legend, go to
<http://www.mofo.com/Circular230.html>

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ATTACHMENT C

STATE OF NEBRASKA SERVICE CONTRACT AWARD

State Purchasing Bureau
301 Centennial Mall South, 1st Floor
Lincoln, Nebraska 68508

OR

P.O. Box 94847
Lincoln, Nebraska 68509-4847
Telephone: (402) 471-2401
Fax: (402) 471-2089

CONTRACT NUMBER

2685 04

PAGE 1 OF 2	ORDER DATE 09/06/07
BUSINESS UNIT 9000	BUYER RUTH GRAY
VENDOR NUMBER: 3773547	
VENDOR ADDRESS: GLOBAL TEL * LINK 6612 E 75TH ST INDIANAPOLIS IN 46250-2875	

AN AWARD HAS BEEN MADE TO THE VENDOR/CONTRACTOR NAMED ABOVE FOR THE SERVICES AS LISTED BELOW FOR THE PERIOD:

NOVEMBER 27, 2007 THROUGH NOVEMBER 26, 2008

THIS CONTRACT IS NOT AN EXCLUSIVE CONTRACT TO FURNISH THE SERVICES SHOWN BELOW, AND DOES NOT PRECLUDE THE PURCHASE OF SIMILAR SERVICES FROM OTHER SOURCES.

THE STATE RESERVES THE RIGHT TO EXTEND THE PERIOD OF THIS CONTRACT BEYOND THE TERMINATION DATE WHEN MUTUALLY AGREEABLE TO THE VENDOR/CONTRACTOR AND THE STATE OF NEBRASKA.

Contract to provide Inmate Calling Systems for the State of Nebraska covering the period beginning November 27, 2007 through November 26, 2008 with the option to renew for one (1) additional one (1) year period as mutually agreed upon by all parties.

The contract shall incorporate the following previously submitted documents:

1. The signed Request for Proposal form;
2. The original Request for Proposal document;
3. Any Request for Proposal Addenda and/or Amendments to include Questions and Answers;
4. The Contractor's Proposal;
5. Any Contract Amendments, in order of significance, and;
6. Contract Award.

Bid Documents and bid responses are available for viewing in the State Purchasing Bureau, 301 Centennial Mall South, Mall Level, Lincoln, NE 68508.

Agency Contacts: Bob Howard
DAS - Communications
Phone: 402-471-3720
bhoward@doc.state.ne.us



Terry Ewing
Department of Correctional Services
Phone: 402-471-2654
tewing@dcs.state.ne.us

THIS IS THE FIRST RENEWAL OF THE CONTRACT.

Line	Description	Qty	Unit of Measure	Unit Price	Extended Price
	Inmate Calling System				0.00

This contract is to provide Inmate Calling Systems. This contract is at no cost to the State of Nebraska.

Total Order


BUYER

MATERIEL ADMINISTRATOR

STATE OF NEBRASKA
Lincoln, Nebraska

STANDARD CONDITIONS AND TERMS OF CONTRACTUAL SERVICES AND LEASING SOLICITATION AND OFFER

It is the responsibility of the bidder to check the website for all information relevant to this solicitation to include addenda and/or amendments issued prior to the opening date. Website address:
<http://www.das.state.ne.us/material/purchasing/purchasing.html>

SCOPE: These standard conditions and terms of Request for Proposal for Contractual Services and acceptance apply in like force to this inquiry and to any subsequent contract resulting therefrom.

EXECUTION: Proposals must be signed in ink by the bidder on the State of Nebraska's Request for Proposal for Contractual Services form. All proposals must be typewritten or in ink and include the signed State of Nebraska's Request for Proposal for Contractual Services form. Erasures and alterations must be initialed by the contractor in ink. No telephone, facsimile or voice proposals will be accepted. Failure to comply with these provisions may result in the rejection of the proposal.

PAYMENT: Payment will be made by the responsible agency in conjunction with the State of Nebraska Prompt Payment Act (Neb. Rev. Stat. §81-2401 through 81-2408). The State may request that payment be made electronically instead of by State warrant.

COLLUSIVE BIDDING: The bidder's signature on the State of Nebraska's Request for Proposal for Contractual Services form is a guarantee that the prices quoted have been arrived at without collusion with other eligible bidders and without effort to preclude the State of Nebraska from obtaining the lowest possible competitive price.

SPECIFICATIONS: Bidders must submit a proposal in accordance with the Terms and Conditions of the Request for Proposal.

ALTERNATE TERMS AND CONDITIONS: The State, at its sole discretion, may entertain alternative terms and conditions which deviate from the Request for Proposal requirements. Alternative terms and conditions may be considered if overall contract performance would be improved but not compromised, and if they are in the best interest of the State of Nebraska. Alternative terms and conditions must be submitted with the proposal and must be clearly identified and detailed in such a way that allows such deviations to be fully evaluated. Alternative terms and conditions are discouraged and unless explicitly accepted by the State are deemed to be rejected.

PROPOSAL OPENING: Openings shall be public on the date and time specified in the Request for Proposal. It is the bidder's responsibility to assure the proposal is delivered no later than the designated date, time and place of the proposal opening. Telephone and/or fax proposals are not acceptable. A proposal may not be altered after opening of the proposals.

LATE PROPOSALS: Proposals received after the time and date of the proposal opening will be considered late proposals. Late proposals will be returned to the bidder unopened. The State is not responsible for proposals that are late or lost due to mail service inadequacies, traffic or other similar reasons.

RECYCLING: Preference will be given to items which are manufactured or produced from recycled material or which can be readily reused or recycled after their normal use as per state statute (Neb. Rev. Stat. §81-15, 159).

AWARD: All purchases, leases, or contracts which are based on competitive proposals will be awarded according to the provisions in the Request for Proposal. The State reserves the right to reject any or all proposals, wholly or in part, or to award to multiple bidders in whole or in part. The State reserves the right to waive any deviations or errors that are not material, do not invalidate the legitimacy of the proposal, and do not improve the bidder's competitive position. All awards will be made in a manner deemed in the best interest of the State.

PERFORMANCE AND DEFAULT: The State reserves the right to require a performance bond from the successful contractor, as provided by law, without expense to the State. Otherwise, in case of default of the contractor, the State may contract the service from other sources and hold the contractor responsible for any excess cost occasioned thereby.

NONDISCRIMINATION: The Nebraska Fair Employment Practice Act prohibits contractors of the State of Nebraska, and their subcontractors, from discriminating against any employee or applicant for employment, with respect to hire, tenure, terms, conditions or privileges of employment because of race, color, religion, sex, disability, or national origin (Neb. Rev. Stat. §§48-1101 to 48-1125). The contractor guarantees compliance with the Nebraska Fair Employment Practice Act, and breach of this provision shall be regarded as a material breach of contract. The contractor shall insert a similar provision in all subcontracts for services to be covered by any contract resulting from this Request for Proposal.

DRUG POLICY: Contractor certifies that it maintains a drug free work place environment to ensure worker safety and workplace integrity. Contractor agrees to provide a copy of its drug free workplace policy at any time upon request by the State.

GRIEVANCE AND PROTEST: Grievance and protest procedure is available by contacting the buyer. Any Protests must be filed by a vendor within ten (10) calendar days after the intent to award decision is posted to the Internet.

ATTACHMENT D

Krogh, Frank

From: Ewing, Terry [Terry.Ewing@nebraska.gov]
Sent: May 28, 2008 2:17 PM
To: Krogh, Frank; Howard, Bob; Gray, Ruth
Subject: RE: Inmate Calling Service Contract

Mr. Krogh,

The rates are the same as in the original 2002 contract award. Interstate collect rates are \$0.75 surcharge and \$0.20 per minute. Interstate debit rates are \$0.60 surcharge and 0.16 per minute.

I'd like to visit with you about the case your involved with. Please call.

Thank you,

Terry R. Ewing
Special Services Administrator
Nebraska Department of Correctional Services
PH 402-479-5705
FAX 402-479-5819

From: Krogh, Frank [mailto:FKrogh@mofo.com]
Sent: Wednesday, May 28, 2008 10:54 AM
To: Howard, Bob; Gray, Ruth
Cc: Ewing, Terry
Subject: RE: Inmate Calling Service Contract

Dear Mr. Howard:

As I indicated in the voice mail I left on your extension yesterday, this relates to an FCC proceeding addressing interstate inmate calling service rates. You might recall that we spoke about the renewal of the Inmate Calling service contract last year. A question has come up in the FCC proceeding as to the interstate rates in the current contract. Based on the Service Contract Award for the first renewal of the Inmate Calling contract with Global Tel*Link, executed last September, I understood the rates to be the same as they were in the original 2002 contract with AT&T. If that is not correct, I would appreciate information as to the current interstate inmate collect and debit rates. Thank you for your attention to this matter.

Yours truly,

Frank Krogh

From: Howard, Bob [mailto:bob.howard@nebraska.gov]
Sent: May 28, 2008 11:43 AM
To: Krogh, Frank; Gray, Ruth
Cc: Ewing, Terry
Subject: RE: Inmate Calling Service Contract

What's this about?

6/11/2008

Bob Howard, CCNT
State Network Supervisor
Nebraska Office of the CIO
402-471-3720

From: Krogh, Frank [mailto:FKrogh@mofo.com]
Sent: Wednesday, May 28, 2008 10:40 AM
To: Gray, Ruth
Cc: Howard, Bob; Ewing, Terry
Subject: Inmate Calling Service Contract

Dear Ms. Gray:

Pursuant to our telephone conversation, I have two questions concerning the First Renewal of the Inmate Calling service contract between Nebraska and Global Tel*Link, Contract No. 2685 O4, Order Date 09/06/07:

1. Did that contract carry forward the same interstate inmate calling rates as the prior contract?
2. Were those rates \$0.20 per minute with a per call charge of \$0.75 for interstate collect calls, and \$0.16 per minute with a \$0.60 per call charge for interstate debit calls?

I have copied the two other individuals shown on the Service Contract Award. Thank you for your attention to this matter.

Yours truly,

Frank Krogh

Morrison & Foerster
2000 Pennsylvania Ave., N.W.
Washington, DC 20006
Voice: (202) 887-8743
Fax: (202) 887-0763
fkrogh@mofo.com

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